BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of Court Below.

The opinion in the Circuit Court of Appeals of the Fifth Circuit (R. 55) is reported in 109 Fed. Reporter, 2d Series, Page 740. Judgment was entered February 17, 1940 (R. 58). Petition for rehearing was denied by order entered March 17, 1940 (R. 65).

II.

Jurisdiction.

1. The date of the judgment to be reviewed was filed in the United States District Court in and for the Southern District of Florida, Tampa Division, April 3, 1939 (R. 38). Order denying petition for rehearing was filed in the United States District Court, Southern District of Florida, Tampa Division, June 24, 1939 (R. 42).

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Section 240 (a) of the Judicial Code, 28 U. S. C. A. Section 357 (a).

3. The jurisdiction of this Court arises by reason of the fact that the petitioner has been deprived of its inalienable rights under Section 12 of the Declaration of Rights of the Constitution of Florida. (See *State ex rel. Davis* v. *City of Largo*, 110 Fla. 21, 149 So. 420.) The effect of the decision and judgment of the Circuit Court of Appeals places upon this petitioner an obligation to pay the debt of another in violation of Article 14 of the Amendments to the Constitution of the United States.

III.

Statement of the Case.

The case is briefly stated under the heading "Summary Statement of the Matter Involved" contained in the petition for the Writ hereto annexed.

Specification of Errors.

1. The District Court and the Circuit Court of Appeals erred in holding that the City of Largo ever existed either *de jure* or *de facto* and for that reason there was no lawful authority for the issuing of the obligations involved in this suit.

2. The District Court and the Circuit Court of Appeals erred in holding the obligations involved in this suit valid in the absence of any showing that they were authorized by a vote of the freeholders in accordance with the provisions of the Legislative Act creating the City of Largo.

3. The District Court and the Circuit Court of Appeals erred in holding that the Town of Largo was or could be the legal successor to the City of Largo.

Introduction to Argument.

Under each of the foregoing heads, severally, we will undertake to show error in the decisions below, together with reasons why this Court should review such errors.

ARGUMENT.

First Assignment of Error.

The District Court and the Circuit Court of Appeals erred in holding that the City of Largo ever existed either *de jure* or *de facto* and for that reason there was no lawful

authority for the issuing of the obligations involved in this suit.

We respectfully call the Court's attention to the language of the Supreme Court of Florida in the case of *City of Winter Haven* vs. *A. M. Klemm & Son*, reported in 181 So. 153:

> "Where a statute establishing, or relating to, the jurisdiction and powers of a municipality, or a part of such statute, violates a command or a prohibition of the Constitution which relates, not merely to the form of the exercise of the legislative power in enacting statutes, as does Section 16, Article 3, but which relates to the nature or character of the subject matter of the enactment, as do Section 17, Article 12, Section 30, Article 3, and Section 7, Article 9, such statute, or a severable portion thereof so violating the Constitution, may be adjudicated to be invalid and inoperative *ab initio*, and, as in such cases the invalidity of the act or the portion thereof goes to the power of the Legislature to enact the law, and not merely to the form of the enactment, no rights or correlative obligations may arise under such invalid statute or invalid portion of the statute. Such invalid statute or part of a statute could not be validated by statute or by judicial decree. See *Brown* v. *City of Lakeland*, 61 Fla. 508, 54 So. 716; *Munroe* v. *Reeves*, 71 Fla. 612, 71 So. 922; *Weinberger* v. *Board of Public Instruction*, 93 Fla. 470, 112 So. 253; *Nuveen & Co.* v. *City of Quincy*, 115 Fla. 510, 156 So. 153, 94 A. L. R. 600; *State ex rel Nuveen* v. *Greer*, 88 Fla. 249, 102 So. 739, 37 A. L. R. 1298."

It will be noted from the foregoing language of our Supreme Court that there is a marked difference in the effect of a municipal Charter Act which is unconstitutional because of some formal defect, and one which is, as in the present case, unconstitutional because in violation of a positive constitutional limitation. In the latter case the

law is never effective, and, consequently, the municipality could not exist either *de jure* or *de facto* under such a law.

The Legislative Act under which the obligations involved herein were issued was, by the Supreme Court of Florida, in the case of *State of Florida ex rel. Davis, et al.*, v. *City of Largo*, 149 So. 420, declared to be unconstitutional and void as a whole, as violative of Section 12 of the Declaration of Rights, Constitution of Florida. The holding in that case was sustained and quoted at considerable length by the Supreme Court of Florida in *State ex rel. Davis, Attorney General* v. *City of Pompano*, 113 Fla. 246, 151 So. 485, and, as a matter of fact, the Court decided the last quoted case upon the authority in the *Largo* case, but it will be noted that, in the *Pompano* case, the act was declared to be unconstitutional only as to those lands which were not previously within the boundaries of the Town of Pompano, while in the instant case, the whole act was unconstitutional and void.

Bonds had been issued in the name of the City of Pompano, and the holders thereof instituted a proceeding to enforce the levy of a tax by the Town of Pompano to pay the same, *State ex rel. Harrington* v. *City of Pampano*, 188 So. 610, but the court held, in effect, that, since the act creating the City of Pompano was unconstitutional, as to all that territory not previously in the Town of Pompano, and, since the City of Pompano never existed, the bonds were necessarily void, quoting numerous authorities, including the pertinent ruling in the *Ocean Beach Heights* case, 302 U. S. 614, 82 L. Ed. 478, decided by the United States Supreme Court January 17, 1938. In this mandamus proceeding, the *Largo* case was referred to and cited as being in line with the Court's ruling in the *Pompano* case, and it was held that the bonds were issued without authority of law, that the Court was unable to extend the doctrine of *de facto*

and *de jure* municipal jurisdiction and powers to the facts in that case, and further quoted from McQuillan and other authorities that,

> "Want of power to issue is a defense even against bona fide holders, that the bonds are *ultra vires, i. e.* that the municipality had no implied or expressed authority to issue bonds for the particular purpose * * * likewise it is a defense even as against bona fide holders that the statute authorizing the issuance of the bonds is unconstitutional * * *"

On a rehearing in this case, it was brought out that part of the bonds were actually issued by the Town of Pompano under proper legislative authority, and, for that reason, they were sustained as against the Town of Pompano, but not against the territory which was unconstitutionally included.

Other questions were presented to the Court in that case concerning a lack of vote of the freeholders to authorize the issuance of the bonds, and will be discussed with reference to the second point in this brief. It is to be noted, nevertheless, that the *Pompano* case and the *Largo* case are identical; that the Legislative act creating the City of Pompano and the Legislative act creating the City of Largo were both declared unconstitutional because in violation of Section 12 of the Declaration of Rights, Constitution of Florida, and, in so far, as this Petitioner knows, among all the cases arising by reason of the extension of municipal boundaries during the late Florida land boom, these two cases were the only ones in that particular category, and, as has already been pointed out, the Supreme Court of Florida has several times differentiated between these cases and those numerous other cases in which the Court held a municipality to have existed as a *de facto* municipality.

Second Assignment of Error.

The District Court and the Circuit Court of Appeals erred in holding the obligations involved in this suit valid in the absence of any showing that they were authorized by a vote of the freeholders in accordance with the provisions of the Legislative Act creating the City of Largo.

While the bonds did not purport to be issued by this petitioner, Town of Largo, nor has there been any contention that petitioner had any part in the issuance thereof, nevertheless, it was held by the court below that petitioner was liable for said bonds as a successor to the maker thereof, *i. e.*, the City of Largo; however, the Charter of the Town of Largo (App. 1 & 2) likewise required a vote of the freeholders to authorize the issuance of bonds. If the Plaintiff were endeavoring to enforce his bonds against the special assessments, upon which they were predicated, then such a judgment would affect only persons who had benefited by the issuance and sale of said bonds, and such a judgment would be reasonable, but a judgment of the character entered herein, being a general obligation, would be, under the law, enforceable by a general tax levy against all persons alike, the majority of whom received absolutely no benefits from the expenditure of the money and had no notice (R. 38) that the bonds were to be issued or that the special improvements were to be paid for by any means other than special assessments. Quoting from *Horigan* v. *Heyward, Mayor, et al.*, 98 F. (2d) 433, text 435, the Court held,

> "* * * the judgment procured by Horigan on his bonds concludes all questions about their validity which might have been raised in that suit";

therefore it would seem that we must insist upon our constitutional rights in this proceeding, otherwise be deprived

of our property without just compensation, in violation of Section 12 of the Declaration of Rights, Constitution of Florida, and Article 14 of the Amendments to the Constitution of the United States.

The bonds recite that they are issued under the authority of Chapter 10761, which was the Charter Act of the City of Largo, and we wish to call the court's attention to the language of this Act (App. 3) under the authority of which the City of Largo undertook to issue these bonds. Section 2, Subsection (3) of said Act is, quoting briefly, as follows:

> "That the inhabitants of the City of Largo * * * shall have the right and power to issue bonds * * * upon the majority vote of all electors actually voting at any bond election provided that no elector shall participate in any bond election who is not a freeholder in said City and who is not otherwise qualified as a voter therein, provided that the maximum amount to which said City of Largo may bond shall not exceed 25 per cent of its assessed valuation."

Division (f) of said section further provides that:

> "The City of Largo shall have all power conferred upon municipalities by the general laws of the State of Florida when not inconsistent with the provisions of this act."

Section 21 provides the manner and method for making special improvements and levying the costs of such against the abutting properties or the properties benefited by such improvements. Section 26 of the City Charter provided:

> "The officers of the City of Largo shall have and exercise all powers conferred by general law upon municipal officers not inconsistent with the terms of this act."

There are other provisions in the Charter Act, under which these bonds were purportedly issued, having refer-

ences to the issuance of bonds based upon certificates of indebtedness under the general laws of the State, but it will be noted that, as a whole, the Charter does not authorize the issuance of bonds without a compliance with the provision with reference to an election authorizing the issuance thereof, and, in this connection, we would call the court's attention to Section 24, Article 3, of the Constitution of Florida, as follows:

> "The Legislature shall establish a uniform system of county and municipal government, which shall be applicable, except in cases where local laws or special laws are provided by the legislature that may be inconsistent therewith."

A ruling case in Florida construing this provision of the Constitution is *City of Appalachicola* v. *State et al.,* 112 So. 618, and, by reference to this case, and the authorities there cited, it will be observed that there was no authority under the law to issue these bonds without a vote of the freeholders.

The bonds recite that they were issued under the authority of Chapter 10761, Special Acts of the Legislature of Florida (City of Largo's Charter, App. 3) and further recite, in the usual phraseology, that all conditions had been complied with in the issuance of said bonds, but, in this connection, we call the court's attention to the language of the Supreme Court of Florida in *Olds* v. *Alvord,* 191 So. 434, whereby the Supreme Court of Florida held $300,000.00 of Special Improvement Bonds to be void, notwithstanding that said bonds carried such recitations and had been validated by decree of the Circuit Court. Quoting from that case the court held:

> "Under provisions in statute creating the town of Belleair Heights in 1923, requiring that issue and sale of bonds be ratified by a majority of electors who paid

taxes on their own property for the year prior to that in which election was held, where no provision for levy and assessment of taxes for the year 1923 was made, and bond election was held prior to July 1, 1924, public improvement bonds issued pursuant to the election were void ab initio.

"Where municipality was without power to issue bonds, a judicial validating decree could not confer validity on bonds issued by the municipality."

Also note the language of the court in the case of *City of DeLand et al.* v. *Moorhead et al.*, 119 So. 117, as follows:

"Under section 8, article 8, of the Constitution, municipalities in this state can exercise only such powers and prerogatives as are conferred on them expressly or impliedly by legislative enactment. Ferguson *v.* McDonald, 66 Fla. 494, 63 So. 915; Malone *v.* Quincy, 66 Fla. 52, 62 So. 922, Ann. Cas. 1916D, 208; Anderson *v.* Shackleford, 74 Fla. 36, 76 So. 343, L. R. A. 1918A, 139. Any doubt as to the alleged authority of a municipality to exercise any power should be resolved against its exercise."

In the *Belleair* case, above quoted, there had been an election, and the bonds had been validated by judicial decree, but the records of the proceedings, taken with the law, show conclusively that the election could not have been a valid one because, under the Charter of Belleair, the electors who participated were not qualified.

The record in this case (Stipulation of counsel, R. 30) will show that there was no attempt to have an election to authorize the issuance of these bonds, and that the general public were not notified that bonds were to be issued. The first issue of bonds, in the sum of $408,856.76, were never validated by judicial decree, and the other validating decrees were, of course, under the ruling in the *Belleair* case and various other cases in Florida, of no effect.

Herein, with reference to the first proposition involved, we quoted at length the language of the Supreme Court of Florida in *State ex rel. Harrington* v. *City of Pompano*, 188 So. 610. In that case, text 630-631, after quoting the pertinent parts of the Charter of the City of Pompano the court held, in effect, that, because certain of the inhabitants of the territory had not voted on the bond issue they could not be charged with the payment thereof.

In the instant case it will be noted that, under the Charter of the City of Largo, the bonds should have been authorized by a vote of the free-holders qualified as voters in the City. If there had been any attempt to hold an election, the question of who was qualified to vote would have been a material one, as it was in the *Belleair* case and in the *Pompano* case, but, in our case, there was no attempt, and, in the language of the Supreme Court of Florida in the *Pompano* case, text page 626:

> "The purpose of the statute, sections 5106 (3296) et seq., C. G. L., providing for judicial validations of bona fide issues of duly authorized governmental bonds and certificates of indebtedness, is to facilitate bona fide sales of valid duly authorized bonds and certificates by means of authorized judicial decrees conclusively adjudicating the validity of such duly authorized bonds and certificates as issued, unless it appears by statute or by the bonds or certificates, or by the duly required record of the validating proceedings or by the record duly required to be made and kept of the advertisement, election or other proceedings required for issuing such duly authorized bonds or certificates, that some express or implied command, prohibition of limitation of the State or Federal constitution was violated in validating or in issuing such duly authorized governmental bonds or certificates of indebtedness. State ex rel. Nuveen *v.* Greer, 88 Fla. 249, 102 So. 739, 37 A. L. R. 1298; Weinberger *v.* Board of Public Instruction, 93 Fla. 470, 112 So. 253; Brown *v.* City of Lakeland, 61 Fla. 508, 54 So. 716."

In the above quoted language the words "expressed or IMPLIED command, prohibition or limitation of the State or Federal Constitution," are material in our case in two respects, first, the Charter Act itself violated Section 12 of the Declaration of Rights, Constitution of Florida, and these bonds as general obligations would also violate the same provision of the Constitution in that it would deprive the people of their property without just compensation. In the *Nuveen* v. *Greer* case, 88 Fla. 249, 102 So. 739, cited by the Supreme Court of Florida in the above language, the court held certain bonds to be void, notwithstanding the fact that they had been recognized as valid by the issuing City, interest had been paid for a long period of time, and part of the principal had been paid. The issuance of the bonds in the *Nuveen* v. *Greer* case was authorized by the City Charter, was not expressly prohibited by the Constitution of Florida, but violated an implied provision of the Constitution, the same as the Charter Act in the instant case impliedly violated Section 12 of the Declaration of Rights, Constitution of Florida, and the Fourteenth Amendment to the Federal Constitution, and, in holding the bonds void, the court says:

> "Municipal bonds issued without competent legal authority or for a purpose that is forbidden by controlling law are invalid even in the hands of bona fide holders for value. And recitals of compliance with law contained in municipal bonds cannot confer authority not legally given to issue the bonds."

Perhaps it is needless to add that the overwhelming weight of authority, and numerous decisions of the Florida Supreme Court, establish the principle that where a bond is issued without authority of law, it cannot be afterwards validated by a legislative act, consequently, the validating acres in this case would have no effect; in the second place,

such an act would be retroactive legislation and would violate Constitutional limitations protecting private property.

In concluding our argument on this point, petitioner respectfully submits that the court erred in entering the judgment in that it did not take into consideration the decisions of the Supreme Court of Florida in construing the act under which the bonds were issued and other pertinent decisions, and especially the effect of the judgment as an invasion of property rights. Certainly the purchasers of these bonds were bound to look into the authority of the issuing municipality, were bound to look into the records of the proceedings for issuance of said bonds and the decision of the Supreme Court of Florida construing the Constitution of Florida. The plaintiff had an opportunity to investigate these points while this petitioner did not, because petitioner had no part in the issuance of said bonds. The citizens of this petitioner, and, as a matter of fact, the citizens of the issuing municipality, had no notice that the bonds were to be issued or that they would be general obligations to encumber their property. The only notice given was with reference to the improvements, and this notice specifically stated that the costs of said improvements would be assessed against and paid by the abutting property (R. 37). It has been shown that, if this judgment be sustained, it becomes a general obligation of this petitioner, payable as other general obligations are payable, and it has been shown, under the decisions of the Supreme Court of Florida, that the defenses we now interpose must be heard in this proceeding; otherwise, petitioner will be barred from ever raising the question again.

Third Assignment of Error.

The District Court and the Circuit Court of Appeals erred in holding that the Town of Largo was or could be the legal successor to the City of Largo.

The court below failed to make any distinction between the Town of Largo and the City of Largo. The Town of Largo exists by virtue of Section 6715, Laws of Florida, 1913 (see App. 1). Section 10761, Laws of 1925 (see App. 3), attempted to abolish the Town of Largo and to create the City of Largo. The latter act was held *void* by the Supreme Court of Florida as violative of Section 12, Declaration of Rights of the State of Florida (see *State ex rel. Davis* v. *City of Largo, supra*).

The Town of Largo could issue its bonded obligations only by an affirmative vote of the majority of its freeholders (see App. 2).

An inspection of the record reveals (R. 5, 6 and 7):

1. The bonds and coupons were issued under the seal of the "City of Largo".

2. The bonds and coupons were issued by officers purporting to act for and in behalf of the "City of Largo".

3. The bonds and coupons were issued according to the recitals contained therein pursuant to a void and unconstitutional act (Section 10961 of the Laws of Florida 1925). The act attempting to create the City of Largo being void, nothing done pursuant thereto has any legal effect (see *Norton* v. *County of Shelby*, 118 U. S. 425, 30 L. Ed. 178); therefore no lawful obligations were created by the City of Largo which the Town of Largo could assume or succeed to either by implication of law, act of the Legislature of the State of Florida, or the manner in which it conducted its municipal affairs (see also *Hillsborough County* v. *Temple Terrace Assets Co.*, 149 So. 473, 111 Fla. 368; *South Ottawa* v. *Perkins*, 84 U. S. 260, 24 L. Ed. 154; *State ex rel. Bours* v. *L'Engle*, 40 Fla. 392, 24 So. 539; *Holland* v. *State*, 15 Fla. 455); and the courts may enjoin their issue (*Brown* v. *City of Lakeland*, 61 Fla. 508, 54 So. 716) or their payment (*Munroe* v. *Reeves*, 71 Fla. 612, 71 So. 922).

Therefore, the City of Largo never existed *de jure* nor *de facto*. The Town of Largo having existed prior to the creation of the City continued to exist only by reason of the Act of the Florida Legislature creating it, and consequently had only such powers as were delegated to it by reason of the provisions contained in said act.

The Supreme Court of Florida has defined the elements necessary to establish or create a *de facto* corporation (see *Municipal Bond & Mortgage Corp.* v. *Bishops Harbor Drainage Dist.*, 182 So. 794, 133 Fla. 430), so it is demonstrated that a *de facto* corporation did not exist here as contemplated by the Supreme Court of Florida.

Conclusion.

For the reasons heretofore advanced it is respectfully urged that the Circuit Court of Appeals erred in affirming the judgment of the District Court and your petitioner, therefore, prays that this Court exercise its supervisory powers by granting the writ of certiorari, and thereafter reviewing and reversing said decision.

M. A. McMULLEN,
Clearwater, Florida,
As Counsel for Petitioner.

GEO. L. BROWN,
CYRIL E. POGUE,
Clearwater, Florida,
Of Counsel for Petitioner.